Supreme Court, U.S.
FILED
94 581 SEP 29 1994
OFFICE OF THE CLERK

No.

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1994

FOSS MARITIME COMPANY,
*Petitioner,*
vs.
DAVID ETTINGER,
*Respondent.*

**On Petition for Writ of Certiorari to the Supreme Court of the United States**

## PETITION FOR WRIT OF CERTIORARI

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37 pp

## QUESTIONS PRESENTED

1. Did the trial court err in granting an extension within which to file a motion for new trial under FRCP Rule 59(b) given the express prohibition of FRCP Rule 6(b)?

2. Did the appellate court err in dismissing Foss' appeal where the granting of Ettinger's motion for new trial was beyond the trial court's jurisdiction, thereby rendering the granting of that motion appealable?

3. Did the trial court and the appellate court improperly apply the "unique circumstances" doctrine to the timing of the filing of a motion for new trial rather than the filing of a notice of appeal?

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No.

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1994

FOSS MARITIME COMPANY,
*Petitioner,*
vs.
DAVID ETTINGER,
*Respondent.*

**On Petition for Writ of Certiorari to the Supreme Court of the United States**

## PETITION FOR WRIT OF CERTIORARI

FOSS MARITIME COMPANY[1] respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

None of the orders by the trial court or the appellate court below is reported officially and each is reproduced in the

[1]Foss Maritime Company was sued below as "PACTOW." For purposes of United States Supreme Court Rule 29.1, petitioner, Foss Maritime Company, a Washington corporation ("Foss" or "petitioner"), is the parent of Pacific Towboat & Salvage Co., a Nevada corporation doing business in California as Foss Maritime. The parent of Foss Maritime Company is Totem Resources Corporation, a Washington corporation. No other parents or subsidiaries (other than wholly-owned subsidiaries) are reported.

Appendix ("App.") at pages 1a-21a. Judgment upon jury verdict was entered on November 17, 1993 (App. 1a.) The trial court granted Ettinger's "Ex Parte Application for Order Enlarging Time to File a Motion for New Trial" on November 23, 1993. (App. 2a.) Ettinger's motion for new trial was granted on February 22, 1994 and bears a filing stamp dated February 23, 1994. (App. 7a.) The Ninth Circuit's order dismissing Foss' appeal was filed on March 29, 1994. (App. 9a.) The Ninth Circuit's order denying Foss' motion for reconsideration was filed on July 1, 1994. (App. 11a.)[2]

## JURISDICTION

The order of the Ninth Circuit Court of Appeals denying Foss' motion for reconsideration was rendered on July 1, 1994. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254.

## STATUTES INVOLVED

Rule 6(b) of the *Federal Rules of Civil Procedure* is reproduced as follows:

> 6(b) *Enlargement.* When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the

[2]The clerk of the Ninth Circuit reported that the delay in ruling on Foss' motion for reconsideration was occasioned by the Ninth Circuit's "calling up" and subsequent review of the file below.

act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), Section 60(b), and 74(a), except to the extent and under the conditions stated in them.

## STATEMENT OF THE CASE

Ettinger brought an action under the Jones Act (46 U.S.C. Section 688) and federal maritime law for personal injuries sustained. On November 17, 1993, the district court entered judgment for Foss after a jury returned a verdict in favor of Foss and against Ettinger.

On November 23, 1993, the District Court granted Ettinger's ex parte request for an enlargement of time within which to file a motion for new trial under FRCP 59. That motion was then filed on December 16, 1993 and served on Foss on December 17, 1993. Following oral argument on January 24, 1994, the motion was granted.

Foss filed its notice of appeal on February 23, 1994. Its lengthy civil appeals docketing statement (App. 12a) noted the unique jurisdictional aspects of the appeal, emphasizing that the trial court's absence of jurisdiction (due to delay) resulted in immediate appellate jurisdiction of an otherwise interlocutory order.

On March 29, 1994, the Ninth Circuit issued an order dismissing Foss' appeal for lack of jurisdiction, citing *Roy v. Volkswagenwerk Aktiengesellschaft*, 781 F.2d 670 (9th Cir. 1985). Despite the authority cited by Foss in its civil appeals docketing statement, particularly with regard to the inability of the trial court to extend the period for filing a motion under Rule 59, the Ninth Circuit instead merely recited the granting of the extension and dismissed Foss' jurisdictional argument as well as its appeal.

On April 12, 1994, Foss filed a "Motion for Reconsideration of Order Dismissing Appeal." That motion focused upon the narrow jurisdictional exception created by the trial court's granting of the Rule 59 motion beyond the mandatory statutory time limits and therefore beyond the trial court's jurisdiction. Due to the passage of time, Foss inquired as to the status of the motion and was advised that no order had been issued because the appellate court had "called up the file for review." On July 1, 1994, some two and one-half months after it was filed, Foss' motion for reconsideration was denied.

## REASONS FOR GRANTING THE PETITION

### I.

### REVIEW SHOULD BE GRANTED TO RESOLVE THE EXISTING CONFLICT BETWEEN THE CIRCUIT COURTS AS TO THE ABILITY OF THE TRIAL COURT TO EXTEND THE TIME TO FILE A MOTION FOR NEW TRIAL UNDER RULE 59(b)

Rule 6(b) expressly provides that "[T]he court . . . may not extend the time for taking any action under Rule . . . 59(b)." This rule of law is widely established throughout the circuits: *Feinstein v. Moses*, 951 F.2d 16, 19 (1st Cir. 1991); *Kraus v. Consolidated Rail Corp.*, 899 F.2d 1360, 1362 (3d Cir. 1990); *Green v. Bisby*, 869 F.2d 1070, 1072 (7th Cir. 1989); and *Scott v. Younger*, 739 F.2d 1464, 1467 (9th Cir. 1984).

In solitary conflict with these established decisions is the Seventh Circuit's decision in *Eady v. Foerder*, 381 F.2d 980 (7th Cir. 1967), which approves an extension of the time for filing a motion for new trial. This Court should resolve the existing conflict by overruling *Eady v. Foerder* so that decision cannot be improperly utilized either by trial courts

or appellate courts to undermine the purpose and effect of the *Federal Rules of Civil Procedure.*

## II.

## REVIEW SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE GRANTING OF A MOTION FOR NEW TRIAL IS PROPERLY APPEALABLE WHEN EXERCISED BEYOND THE TRIAL COURT'S JURISDICTION DUE TO DELAY

Prior to this case, the Ninth Circuit had held that while the granting of a new trial is ordinarily an interlocutory and unappealable order, the extra-jurisdictional grant of a motion for new trial is appealable as a final order. *Eaton v. National Steel Products Co.*, 624 F.2d 863 (9th Cir. 1980); *see also Jones & Guerrero Co. Inc. v. Sealift Pac.*, 650 F.2d 1072 (9th Cir. 1981). Similar exceptions recognizing the appealability of an extra-jurisdictional grant of a motion for new trial are recognized in the Eighth Circuit (*Herold v. Burlington Northern, Inc.*, 761 F.2d 1241 (8th Cir. 1985)) and Third Circuit (*National Passenger RR Corp. v. Maylie*, 910 F.2d 1181 (3d Cir. 1990)). No such recognized exceptions appear in various other circuits, including the Seventh Circuit, where instead the decisions establish only the general rule of non-appealability. *See, for instance, Ash v. Georgia-Pacific Corp.*, 957 F.2d 432 (7th Cir. 1992).

Despite the presence of its own authority recognizing the appealability of the grant of Ettinger's motion for new trial (due to its jurisdictional delay), the Ninth Circuit dismissed Foss' appeal, citing the general rule in *Roy v. Volkswagenwerk Aktiengesellschaft*, 781 F.2d 670 (9th Cir. 1985).[3]

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[3]Therefore, this petition presents not only a conflict between circuits, but also inconsistent decisions from the Ninth Circuit. While the existence of an intracircuit conflict may not, by itself, serve as a proper

Review is therefore necessary to establish uniformity on the issue of appealability.

## III.

## REVIEW SHOULD BE GRANTED BECAUSE THE TRIAL COURT AND NINTH CIRCUIT COURT OF APPEALS HAVE MISAPPLIED THE DOCTRINE OF "UNIQUE CIRCUMSTANCES" IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS

This Court first developed the "unique circumstances" doctrine in *Thompson v. INS*, 375 U.S. 385, 84 S. Ct. 397, 11 L.Ed. 2d 404 (1964), and its companion cases, *Wolfsohn v. Hankin*, 376 U.S. 203, 84 S. Ct. 699, 11 L.Ed. 2d 636 (1964), and *Harris Truck Lines v. Cherry Meat Packers Inc.*, 371 U.S. 214, 83 S. Ct. 283, 9 L.Ed. 2d 261 (1964). In *Thompson*, this Court salvaged an otherwise untimely appeal because the appellant had relied upon the district court's statement that appellant's motion for new trial, though filed 12 days after entry of judgment, had been filed in "ample time," thus leading the appellant to believe that his period for filing the notice of appeal was tolled..

More recently, this Court has further refined the "unique circumstances" doctrine in *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 103 L.Ed. 2d 146, 109 S. Ct. 987 (1989). Declining to save an untimely appeal in *Osterneck*, this Court narrowly limited the *Thompson* holding to its facts, stating:

> By its terms, *Thompson* applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received

---

jurisdictional basis before this Court, such intracircuit conflict is not ignored. *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950).

> specific assurance by a judicial officer that this act has been properly done. That is not the case here.

(489 U.S. at 179, 103 L.Ed. 2d at 157.)

At issue in all of this Court's decisions involving the "unique circumstances" doctrine was the decision to salvage or reject an untimely appeal.

Following the *Osterneck* decision, various circuit courts have questioned the continued vitality of the doctrine, the Ninth Circuit noting for instance in *In Re Slimick*, 928 F.2d 304, 309 n.7 (9th Cir. 1990), that "[r]ecent decisions of the Court have left in doubt the viability of the unique circumstances doctrine." As such, the "unique circumstances" doctrine does not warrant an unprecedented expansion to the facts of this petition.

Had Ettinger filed a late notice of appeal due to reliance on the district court's enlargement of time for the filing of a motion for new trial, the "unique circumstances" doctrine would at least be properly at issue (although, Foss submits, it would not save Ettinger's appeal under these facts). The facts of this appeal, however, concerning only a late motion for new trial, should not have implicated that doctrine.

Only one reported decision has sought to apply the "unique circumstances" doctrine to a situation other than to an untimely appeal and that opinion, *Eady v. Foerder, supra*, has been severely criticized. In *Eady*, the Seventh Circuit, without explanation, applied the doctrine to allow a district court to enlarge the time for the filing of a new trial motion. *Eady* has been seriously questioned, however, in later opinions even within its own circuit. *Bailey v. Sharp*, 782 F.2d 1366, 1369-74 (7th Cir. 1986); *Varhol v. National RR Passenger Corp.*, 909 F.2d 1557 (7th Cir. 1990). The Seventh Circuit's failure to overrule the *Eady* decision, however, presents a direct conflict among the circuits which this Court should resolve by granting this petition.

## IV.

## REVIEW SHOULD BE GRANTED TO ALLOW THIS COURT TO PROVIDE GUIDANCE WITH REGARD TO THE TIMING OF MOTIONS FOR NEW TRIAL AND NOTICES OF APPEAL, IN CONJUNCTION WITH THE APPLICATION OF THE "UNIQUE CIRCUMSTANCES" DOCTRINE

This petition raises significant questions concerning both the timing and effect of motions for new trial as well as notices of appeal. More importantly, it provides this Court with a vehicle within which to define the present status of the "unique circumstances" doctrine.

Should a party be allowed to file a motion for new trial beyond the 10-day jurisdictional limit set forth in FRCP 59(b) and FRCP 6(a)? Once it is conceded that the motion for new trial is untimely, should appellate courts properly entertain an exception to the general rule that orders granting motions for new trial are otherwise unappealable? Should the "unique circumstances" doctrine be extended beyond the confines of a late notice of appeal and allowed to serve as an excuse for non-compliance with Rule 59 contrary to this Court's own opinions?

This petition addresses significant issues of procedural law. Given appellate courts' otherwise strict adherence to procedural deadlines, a resolution of the issues raised in this petition is critical. An untimely motion for new trial should not be saved by the "unique circumstances" doctrine. Once salvaged, however, it should at the very least be subject to immediate review. The Ninth Circuit's order dismissing this appeal should be reversed.

## CONCLUSION

For these reasons, Foss requests that this Court accept this matter for review.

Dated: September 26, 1994

Respectfully submitted,

ROBERT D. FEIGHNER
*Counsel of Record*

WILLIAM H. COLLIER, JR.
MARK W. NELSON
KEESAL, YOUNG & LOGAN
*Attorneys for Defendant*
*Foss Maritime Co.*

# APPENDIX

BEST AVAILABLE COPY

## APPENDIX 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

---

DAVID ETTINGER,
*Plaintiff,*

VS.

PACTOW; "BARGE NO. ONE", her engines, apparel and furniture; and "BARGE NO. TWENTY-SIX", her engines, apparel and furniture,
*Defendants.*

---

Case Number: 92-0361-S(M)

---

**JUDGMENT IN A CIVIL CASE**

---

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED judgment is hereby entered in favor of the defendant and against the plaintiff.

November 17, 1993
*Date*

DON E. HENDRIX
*Clerk*

RAY J. BLANCHARD
*(By) Deputy Clerk Ray J. Blanchard*

## APPENDIX 2

FILED NOVEMBER 20, 1993
DON HENDRIX, CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

THOMAS F. FRIEDBERG, ESQ. (#110439)
LAW OFFICES OF FRIEDBERG & BUNGE
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San Diego, CA 92101
Telephone: (619) 557-0101
*Attorneys for Plaintiff*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

---

DAVID ETTINGER,
*Plaintiff.*

v.

PACTOW; "BARGE NUMBER ONE", her engines, apparel and furniture; and "BARGE NUMBER TWENTY-SIX", her engines, apparel and furniture,
*Defendants.*

---

Case No. 92 361 S (M)
[F.R.C.P. Rule 6(b); Rule 59(b)]

---

**EX PARTE APPLICATION FOR ORDER ENLARGING TIME TO FILE A MOTION FOR NEW TRIAL**

---

Plaintiff, DAVID ETTINGER, hereby applies for ex parte order enlarging the time within which to file a motion for a new trial pursuant to Federal Rules of Civil Procedure, Rule 59.

Judgment was entered in this matter in favor of defendant and against plaintiff on November 17, 1993. Under Rule 59(b), motion for a new trial must be filed and served no later than ten (10) days after entry of judgment.

In order to fully brief the issues, plaintiff respectfully requests that this Court enlarge the time to file a motion for a new trial to thirty (30) days from the date of entry of judgment. This procedure is authorized under Federal Rules of Civil Procedure, Rule 6(b).

On or about November 17, 1993, plaintiff's attorneys contacted defense counsel and requested that defense counsel stipulate to enlarging the time to bring a motion for a new trial. Defense counsel specifically refused to stipulate to extend the time more than the statutorily authorized ten (10) days.

Based thereupon, plaintiff respectfully request that this Court issue an ex parte order enlarging the time within which to file a motion for a new trial to thirty (30) days from the date of entry of judgment herein.

Dated: November 17, 1993

Respectfully submitted,

LAW OFFICES OF
FRIEDBERG & BUNGE

By: /s/ THOMAS F. FRIEDBERG
THOMAS F. FRIEDBERG, ESQ.
*Attorneys for Plaintiff*

IT IS SO ORDERED:

Dated: November 23, 1993

/s/ EDWARD J. SCHWARTZ
HONORABLE EDWARD J. SCHWARTZ

THOMAS F. FRIEDBERG, ESQ. (#110439)
SARAH L. BUNGE, ESQ. (#115499)
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402 West Broadway, 25th Floor
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(619) 557-0101
*Attorneys for Plaintiff, David Ettinger*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

---

ETTINGER,
*Plaintiff,*

v.

PACTOW, et al.
*Defendants.*

---

Case No. 92 361 S (M)

---

**PROOF OF SERVICE BY FACSIMILE AND U.S. MAIL**

---

I, the undersigned individual, declare: That I am, and was at the time of service of the papers herein referred to, over the age of eighteen years, and not a party to the action; and I am employed in the County of San Diego, California, in which county the within-mentioned mailing occurred. My business address is 402 West Broadway, 25th Floor, San Diego, California. I served a copy of the following document(s):

EX PARTE APPLICATION FOR ORDER ENLARGING TIME TO FILE A MOTION FOR NEW TRIAL

by delivering by facsimile and U.S. mail a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

| *Party Served/ Status:* | *Attorney of Record/ Address/Telephone:* |
|---|---|
| Defendant, FOSS MARITIME, INC. | WILLIAM H. COLLIER, JR., ESQ.<br>MARK W. NELSON, ESQ.<br>KEESAL, YOUNG & LOGAN<br>P.O. Box 1730<br>Long Beach, CA 90801-1730<br>(310) 436-9051 |

I sealed each envelope and, with the postage thereon fully prepaid, deposited each in the United States mail at San Diego, California, on November 18, 1993.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

This declaration is executed this 18th day of November, 1993.

/s/ DEBORAH S. WAY

## APPENDIX 3

FILED FEBRUARY 23, 1994
DON HENDRIX, CLERK
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

THOMAS F. FRIEDBERG, ESQ. (#110439)
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

---

DAVID ETTINGER,
*Plaintiff,*

v.

PACTOW; "BARGE NUMBER ONE", her engines, apparel and furniture; and "BARGE NUMBER TWENTY-SIX", her engines, apparel and furniture,
*Defendants.*

---

Case No. 92 361 S (M)

---

**ORDER GRANTING PLAINTIFF'S MOTION FOR NEW TRIAL**

---

Date: January 24, 1994
Time: 10:30 a.m.
Courtroom: 4

---

The motion of plaintiff, DAVID ETTINGER, for new trial pursuant to Federal Rules of Court, Rule 59, came on regularly for hearing on January 24, 1994, at 10:30 a.m., in

Courtroom 4, before the Honorable Edward J. Schwartz. Plaintiff, DAVID ETTINGER, by and through his attorneys of record, Friedberg & Bunge, by Thomas F. Friedberg; defendant, PACTOW, et al., appeared by and through its attorney of record, Keesal, Young & Logan, by Mark W. Nelson.

The Court, after having heard the evidence in the jury trial in the above-captioned matter, and after having reviewed the papers and affidavits in support of the motion and opposition of the motion for new trial:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff's Motion for New Trial is considered timely by the Court.

2. The Court, having considered all of the papers and oral arguments, hereby grants plaintiff's Motion for New Trial.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the jury verdict in the above-captioned matter be, and hereby is, set aside, and that plaintiff's Motion for a New Trial is hereby granted.

Dated: February 22, 1994

EDWARD J. SCHWARTZ

HONORABLE EDWARD J. SCHWARTZ

## APPENDIX 4

FILED MARCH 29, 1994
CATHY A. CATTERSON,
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

DAVID ETTINGER,
*Plaintiff-Appellee,*

v.

PACTOW; "BARGE NUMBER ONE", her engines, apparel and furniture, et al.,
*Defendants-Appellants.*

---

No. 94-55265
DC# CV-92-00361-EJS
Southern California
(San Diego)

---

**ORDER**

---

Before: FLETCHER, BRUNETTI and TROTT,
Circuit Judges

Appellants have filed a notice of appeal from the district court's order granting a motion for new trial. Generally, an order granting a motion for a new trial is not a final, appealable order. *See Roy v. Volkswagenwerk Aktiengesellschaft,* 781 F.2d 670 (9th Cir. 1985). Nevertheless, in the notice of appeal appellants argue that the notice of appeal is valid because the district court lacked jurisdiction to consider the motion for new trial since the motion was served more than 10 days after entry of judgment as prescribed by Fed. R. Civ. P. 59(e). It is clear from the record however, that the district court granted plaintiff an extension of time to file its motion for new trial and ultimately granted the

motion for new trial. Accordingly, appellants' argument that the district court lacked jurisdiction to grant the motion for new trial is without merit and this appeal is dismissed. *See id.*

## APPENDIX 5

NOT FOR PUBLICATION

FILED JULY 1, 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

DAVID ETTINGER,
*Plaintiff-Appellee,*

v.

PACTOW; "BARGE NUMBER ONE", her engines, apparel and furniture, et al.,
*Defendants-Appellants.*

---

No. 94-55265
D.C. No. CV-92-00361-EJS
Southern California
(San Diego)

---

**ORDER**

---

Before: FLETCHER, BRUNETTI and TROTT, Circuit Judges

Appellee's motion for reconsideration is denied.

## APPENDIX 6

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CIVIL APPEALS DOCKETING STATEMENT

DAVID ETTINGER,
*Plaintiff.*

v.

PACTOW; "BARGE NUMBER ONE", her engines, apparel and furniture; and "BARGE NUMBER TWENTY-SIX", her engineer, apparel and furniture,
*Defendants.*

District: Southern District

Judge: Edward J. Schwartz

Date Complaint Filed: March 9, 1992

District Court Docket Number: 92-361 S (M)

Date Notice of Appeal Filed: February 23, 1994

Is this a Cross-Appeal? ☐ Yes ☒ No

Has this matter been before this court previously? ☐ Yes ☒ No

### JURISDICTION

1. FEDERAL
   - ☐ Federal Question
   - ☐ Diversity
   - ☐ Other (specify):
2. APPELLATE
   - ☐ Final Decision of District Court
   - ☒ Interlocutory Decision Appealable as of right see attached
   - ☐ Interlocutory Order certified by District Court Judge (specify):

☐ Other Property

## DISTRICT COURT DISPOSITION

1. STAGE OF PROCEEDINGS
   - ☐ Pre-Trial
   - ☐ During Trial
   - ☐ After trial but after new trial was granted, without trial court's jurisdiction to do so (untimely)

2. TYPE OF JUDGMENT/ORDER APPEALED
   - ☐ Default Judgment
   - ☐ Judgment/Court Decision
   - ☐ Dismissal/Jurisdiction
   - ☐ Judgment/Jury Verdict
   - ☐ Dismissal/Merits
   - ☐ Summary Judgment
   - ☐ Judgment NOV
   - ☐ Declaratory Judgment
   - ☐ Directed Verdict
   - ☒ Other (specify):

   see attached

3. RELIEF
   - ☐ Damages: N/A

     Amount Sought: $_____

     Amount ☐ Granted:

     ☐ Denied $_____

   - ☐ Injunctions:

     ☐ Preliminary or ☐ Permanent

     ☐ Granted or ☐ Denied

Appeal concerns only the issue of authority to grant new trial beyond jurisdictional deadline.

BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW:

Plaintiff brought suit under the Jones Act (46 U.S.C. Section 688) and federal maritime law for personal injuries sustained on 3/9/91. On 11/17/93, the district court entered judgment for defendant/appellant after a jury returned a verdict in favor of defendant/appellant and against plaintiff. On 11/23/93, the district court granted plaintiff's request for an enlargement of time to file a motion for new trial under Rule 59 of the FRCP. Plaintiff filed his motion for new trial on 12/16/93 and served a copy of the motion on defendant/appellant on 12/17/93. By order dated 2/23/94, the district court granted plaintiff's motion for new trial on plaintiff's claim for unseaworthiness. This motion was granted despite defendant/appellants' objection that plaintiff's motion was untimely under Rule 6(a) and 59 of the FRCP.

ISSUES PROPOSED TO BE RAISED ON APPEAL:

1. Jurisdictional limitations on extending right to file motion for new trial under FRCP.

2. "Unique Circumstances" doctrine applies only to tolling of appeal period rather than new trial period following excused delay.

3. Ettinger's failure to comply with the requirements of the unique circumstances doctrine in the Ninth Circuit.

4. The complete disapproval of the Seventh Circuit's decision in *Eady v. Foerder,* 381 F.2d 980 (7th Cir. 1967) by all 7th Circuit panels both before and after that decision and the absence of any support or following by any other Circuit of the *Eady* decision.

BASED ON YOUR PRESENT KNOWLEDGE:

1. Does this appeal involve a question of first impression?
   __ Yes X No

2. Will the determination of this appeal turn on the interpretation or application of a particular case or statute?
   X Yes __ No

   Case name/statute: see attached

   Citation: _____

   Docket number, if unreported: _____

3. Is there any case now pending or about to be filed in this court or any other court or administrative agency which:

   a) Arises from substantially the same case or controversy as this appeal? __ Yes X No

   b) Involves an issue that is substantially the same, similar or related to an issue in this appeal?
      __ Yes X No

      Case name: _____

      Citation: _____

      Court or agency: _____

      Docket number, if unreported: _____

      _____

4. Will this appeal involve a conflict of law within the Ninth Circuit? __ Yes X No

   Among circuits? __ Yes X No

   If yes, explain briefly:

   _____

   _____

   _____

DOES THIS APPEAL INVOLVE ANY OF THE FOLLOWING:

__ Possibility of settlement;

__ Likelihood of a motion to expedite the appeal;

__ Multiple parties on either side for whom joint briefing is possible;

__ Likelihood of motions to intervene on appeal;

__ Likelihood of motions to file amicus briefs;

__ Likelihood of motions to stay appeal pending resolution of a related case. Identify case name, docket number and court or agency:

_____

X Other procedural complexities:
Stay of trial court's action is necessary to avoid rendering appeal moot. Action will be completed if appeal is successful.

COUNSEL FOR APPELLANT(S):

NAME: Robert D. Feighner; Mark W. Nelson, William H. Collier, Jr.

FIRM: Keesal, Young & Logan

ADDRESS: 310 Golden Shore, P.O. Box 1730, Long Beach, CA 90801-1730

TELEPHONE: (310) 436-2000

I CERTIFY THAT A COPY OF THIS CIVIL APPEALS DOCKETING STATEMENT WAS SUBMITTED TO THE CLERK OF THE DISTRICT COURT OR THE CLERK OF U.S. COURT OF APPEALS, AND THAT IT WAS SERVED ON EACH PARTY/COUNSEL SHOWN ON THE ATTORNEY'S SERVICE LIST.

| /s/ ROBERT D. FEIGHNER | 2/23/94 |
|---|---|
| Signature | Date |

REMEMBER TO ATTACH COPIES OF ORDER/JUDGMENT APPEALED FROM AND SERVICE LIST WITH TELEPHONE NUMBERS

Continuation

Civil Appeals Docketing Statement

In Re: Ettinger v. PACTOW, et al.
District Court # 92-361 S (M)

Jurisdiction:

Appellate: Interlocutory: new trial motion granted despite absence of jurisdiction due to delay.

*Jones & Guerrero Co., Inc. v. Sealift Pac.*, 650 F.2d 1072 (9th Cir. 1981).

*Eaton v. National Steel Products Co.*, 624 F.2d 863 (9th Cir. 1980).

District Court Disposition:

2. Type of Judgment/Order Appealed:

The order appealed from is the order granting a motion for new trial. While not ordinarily appealable, the order granting Ettinger's motion for new trial is directly appealable by virtue of the fact that the trial court was without jurisdiction to issue the order. (See cases cited above.) Specifically, the motion for order granting new trial was filed more than 10 days after the entry of judgment in violation of Rule 6(b) and 59 of the *Federal Rules of Civil Procedure*.

2. "Will the determination of this appeal turn on the interpretation or application of a particular case or statute?"

Yes — *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989)
*In Re Slimick*, 928 F.2d 304 (9th Cir. 1990)
*Feinstein v. Moses*, 951 F.2d 16 (1st Cir. 1991)

FILED FEBRUARY 23, 1994
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

THOMAS F. FRIEDBERG, ESQ. (#110439)
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Emerald Shapery Center
402 West Broadway, 25th Floor
San Diego, CA 92101
Telephone: (619) 557-0101

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID ETTINGER,
*Plaintiff,*

v.

PACTOW; "BARGE NUMBER ONE",
her engines, apparel and furniture; and
"BARGE NUMBER TWENTY-SIX",
her engines, apparel and furniture,
*Defendants.*

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Case No. 92 361 S (M)

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**ORDER GRANTING PLAINTIFF'S MOTION FOR NEW TRIAL**

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DATE: January 24, 1994
TIME: 10:30 a.m.
CTRM: 4

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The motion of plaintiff, DAVID ETTINGER, for new trial pursuant to Federal Rules Of Court, Rule 59, came on regularly for hearing on January 24, 1994, at 10:30 a.m., in Courtroom 4, before the Honorable Edward J. Schwartz.

Plaintiff, DAVID ETTINGER, by and through his attorneys of record, Friedberg & Bunge, by Thomas F. Friedberg; defendant, PACTOW, et al., appeared by and through its attorney of record, Keesal, Young & Logan, by Mark W. Nelson.

The Court, after having heard the evidence in the jury trial in the above-captioned matter, and after having reviewed the papers and affidavits in support of the motion and opposition of the motion for new trial:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff's Motion for New Trial is considered timely by the Court.

2. The Court, having considered all of the papers and oral arguments, hereby grants plaintiff's Motion for New Trial.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the jury verdict in the above-captioned matter be, and hereby is, set aside, and that plaintiff's Motion for a New Trial is hereby granted.

Dated: February 22, 1994

/s/ EDWARD J. SCHWARTZ
HONORABLE EDWARD J. SCHWARTZ

## PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I, Karen A. Stone, declare that I am employed in the county of Los Angeles, state of California. I am over the age of eighteen and not a party to the within action. My business address is 310 Golden Shore, Catalina Landing, P.O. Box 1730, Long Beach, California 90801-1730.

On February 23, 1994, I served the foregoing document described as CIVIL APPEALS DOCKETING STATEMENT on the parties in this action by placing true copies thereof enclosed in a sealed envelope addressed as follows:

Thomas F. Friedberg, Esq.
Law Offices of Friedberg & Bunge
Emerald Shapery Center
402 West Broadway, 25th Floor
San Diego, CA 92101

I deposited such envelope in the mail at 310 Golden Shore, Catalina Landing, Long Beach, California. The envelope was mailed with postage thereon fully prepaid.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Long Beach, California in the ordinary course of business.

EXECUTED on February 23, 1994 at Long Beach, California.

I declare that I am employed in the office of a member of the bar at whose direction this service was made.

KAREN A. STONE